

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8523 of 1997

with

CIVIL APPLICATION No 11340 of 1997

With

SPECIAL CIVIL APPLICATION NO. 8534 OF 1997

With

CIVIL APPLICATION NO.11394 OF 1997

With

SPECIAL CIVIL APPLICATION NO. 8536 OF 1997

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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PRAHLADBHAI SHIVRAM PATEL

Versus

DIRECTOR AGRICULTURAL

MARKETING AND RURAL FINANCE

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Appearance:

1. Special Civil Application No. 8523 of 1997  
MR KS JHAVERI for Petitioner  
MR TUSHAR MEHTA for Respondent No. 1  
Mr. S.N.Shelat, Addl. A.G. with AGP Mr. B.Y.Mankad,  
for Respondent No. 2  
Mr. K.G.Vakharia with Mr. Tushar Mehta, advocates for  
Respondent no. 3.  
Mr. Nagesh Sood for respondent no.4.  
Mr. B.S.Patel with Ms. R.B.Patel, Ms. Sneha  
Vaidya and Mr. Dilip Rana, advocate for respondent no. 5.
2. Special Civil Application NO. 8534 of 1997.  
Mr. S.K.Jhaveri, advocate for the petitioners.  
Mr. S.N.Shelat, Addl. A.G. with Mr. B.Y.Mankad, AGP  
for respondent nos. 1, 2 and 3.  
Mr. K.G.Vakharia with Mr. Tushar Mehta, advocates  
for respondent no. 3.  
Mr. Nagesh Sood for respondent no. 4.  
Mr. B.S.Pate with Ms. R.B.P, Ms. Sneha Vaidya and  
Mr. Dilip Rana, advocates for respondent no. 5.
3. Special Civil Application No. 8536 of 1997  
Mr. S.K.Jhaveri, advocate for the petitioners  
Mr. S.N.Shelat, Addl. AG with Mr. B.Y.Mankad, AGP for  
respondent nos. 1,2 and 3.  
Mr. K.G.Vakharia with Mr. Tushar Mehta, advocates  
for respondent no. 3.  
Mr. Nagesh Sood for respondent no. 4.  
Mr. B.S.Patel with Ms. R.B.Patel, Ms. Sneha Vaidya  
and Mr. Dilip Rana, advocates for respondent nos. 5  
and 6.

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CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 10/12/97

ORAL COMMON JUDGEMENT

Rule. Learned Additional Advocate  
General waives service of notice of Rule on behalf of  
respondent nos. 1,2 and 3 in all the petitions. Learned  
advocate Mr. Tushar Mehta waives service of notice of  
Rule on behalf of respondent no. 4 in all the petitions.  
Learned advocate Mr. B.S.Patel waives service of notice  
of Rule on behalf of respondent nos. 5 and 6 in all the  
petitions. With the consent of the learned advocates of  
the parties, these petitions are taken up for final  
hearing.

2. These three petitions are filed by the petitioners who belong to three different categories of voters as contemplated by Rule 7 of Gujarat Agricultural Produce Market Rules, 1965 (hereinafter referred to as Rules of 1965). With the consent of the parties, all these petitions are heard together on merits and they are being disposed of by this common judgment as they pertain to the same question of law involved in these petitions.

### 3. Petitioners in Special Civil Application

No. 8523 of 1997 are the traders who are carrying on their business in the market area of Mahesana Agricultural Produce Market Committee. In petition no. 8534 of 1997, the petitioners are societies registered under Co-operative Societies Act and who are functioning and working within the area of respondent no. 4 Mahesana Agricultural Produce Market Committee. As per the provisions of Rule 7 of Rules of 1965, the members of Managing Committee of these co-operative societies are to become voters for the election of the Committee of Mahesana Agricultural Product Market Committee. The petitioners in Special Civil Application NO. 8536 of 1997 are also co-operative Societies and the members of the Managing Committee of these societies who fall in the co-operative market constituencies are entitled to become voters for the election of the respondent no. 4 Mahesana Agricultural Product Market Committee. The respondent no. 1 in all these petitions, namely Director of Agricultural Marketing and Rural Finance issued the programme for holding the election of respondent no. 4 market committee. As per the said programme on 24.10.97, the authorised officer was to publish the list of voters which is known as Preliminary list, at some conspicuous place in the market yard. On 12.11.97, after considering the objections, if any received, as regards the inclusion or non-inclusion of the voters in the list published on 24.10.97, he was to publish the second list as provided by Rule 8(1-A) and after the publication of the said second list on 12th November, 1997, the final list after considering the objections as regards the addition of names which were not in the list of 24.10.97 as contemplated by Rule 8(1-A), the final list was to be published on 24.11.97. The programme published by the respondent no. 1 further shows that on 29.12.97 is the date for filing nomination papers. 30.12.97 was the date for scrutiny of nomination papers and 2.1.1998 is the date for withdrawal of the nomination papers, if any, and the same date is also the date for publishing list of candidates contesting the election. 12.1.98 is the date for casting votes and 13.1.98 is the date for declaration

of results of the election.

4. It is the case of all the petitioners in all these three petitions that their names were appearing on the preliminary list published on 24.10.97. Their names also continued to appear in the second list published after complying with the provisions of Rule 8(1) on 12.11.97, but when the final list was published on 24.11.97, their names are not appearing in the final list. It is also further claim of the petitioners in petition no. 8536 of 1997 that names of respondent nos. 5 and 6 were not appearing in the preliminary list published on 24.10.97. They were also not appearing in the list published on 12.11.97 and their names are suddenly appearing in the final list published on 24.11.97. It is the contention of the petitioners that if the provisions of rule 8 as a whole is considered, then the respondent no. 3 "Authorised Officer" had no jurisdiction to include the name of the respondent nos. 5 and 6 in the final list published on 24.11.97 as their names were not appearing in the preliminary list published on 24.10.97 as well as in the list published on 12.11.97. It is the contention of all the petitioners that if the provision of Rule 8 is considered as a whole, then the "Authorised Officer" in all these petitions had no jurisdiction to delete the names of the petitioners in the final list when their names were appearing in the preliminary list published on 24.10.97 as well as in the second list published on 12.11.97. It is their contention that when their names were appearing in the preliminary list published on 24.10.98 and as no objections for their being included in the said voters' list were raised before Authorised Officer, after publication of the said list and when the authorised officer has published their names in the second list published on 12.11.97, he had no jurisdiction to delete their names in the final list published on 24.11.97 in view of the provision of Rule 8 of the said Rules of 1965. It is the case of the petitioners in all these petitions that as the order passed by the respondent no. 4 in deleting their names in the final list is passed without jurisdiction and in violation of mandatory provisions of the "Rules of 1965" and they have come before this Court to get the relief of quashing order of respondent no. 3 of deleting their names, under Article 226 of the Constitution. It is their contention that they have no efficacious remedy as per "Rules of 1965" as well as provisions of Agricultural Produce Market Committee Act to get the relief which they are seeking.

5. It is the contention of the respondents

that the matters being pertaining to election, this Court should not intervene with the election programme by exercising discretionary powers under Article 226 of the Constitution because it is the view of the Apex Court as well as this Court that by interfering with the election programme and postponing the election, the Court will be interfering with the statutory activities of the election authorities and that interference of the High Court which would result into postponement or cancellation of the election is not accepted and approved. It is further contended by learned Senior Counsel Mr. Vakharia for the respondent no. 4 in petition no. 8536 of 1996 that the petitioners have not come before this court with clean hands. The petitioners have not given the details of the election programme published by the respondent no. 1 and thus, the petitioners have suppressed the material facts from this Court and therefore, on that count alone, the petitioner is not entitled to get the relief sought for. Mr. Vakharia also further contended and so also by Mr. Shelat, Additional Advocate General that the petitioners have got efficacious remedy as provided by Rule 28 and as also held by the Division Bench of this Court and therefore, the petitiones should not be entertained.

6. I will first deal with the question as to whether the petitions in question could be entertained under Article 226 of the Constitution in view of the facts and material available in these petitions. The respondents have also principally relied on the two decisions of this Court in the case of Mahesana District Co-operative Sales and Purchase Union Ltd. vs. State of Gujarat and others, 1988(2) GLR, 1060 and in the case of Patan Proper Fal and Shak Bhaji Kharid Vechan Sahakari Mandli Ltd. Patan vs. Pali Shak Bhaji and Fal Ful Adi Ugarnaraoni Kharid Vechan Sahakari Mandli Ltd. Mahesana and others, 1986 GLH, 430. In 1986, GLH, 430, Division Bench has considered the earlier decisions of this Court as well as those of Apex Court and has summed up the principles as regards exercising jurisdiction under Article 226 of the Constitution by referring to the summing up by the full Bench of this Court in case of Ahmedabad Cotton Manufacturing Ltd. vs. Union of India and others, 18, GLR, 714. In para 25, the Court has observed as under:

"38. The following principles emerge from the various authorities cited above:

(1) Though the extraordinary jurisdiction of High Court under Articles 226 and 227 of the Constitution is very wide, the Court should be

slow in exercising the said jurisdiction where an alternative efficacious remedy under the Act is available. However, if the impugned order is an ultra vires order, or is a nullity as being ex-facie without jurisdiction, the question of exhausting the alternative remedy could hardly arise.

- (2) It is well recognised on principle and in authority that where a right or liability is created by a statute which gives a special remedy for enforcing it, only the remedy provided by that statute must be availed of.
- (3) The right to vote or stand as a candidate at the election is not a civil right but it a creature of a statute or a special law and must be subject to limitations imposed on it. If the legislature entrusts the determination of all matters relating to election to a special Tribunal, and invests it with a new and unknown jurisdiction, that special jurisdiction alone could be invoked for enforcement of that right.
- (4) In matters of election disputes, the Court should refuse to exercise jurisdiction under Article 226 of the Constitution of India when the statute conferring right to vote or stand at the election prescribes a statutory remedy embracing the disputes pertaining to all aspects of the entire process of election.
- (5) Merely because the challenge is to the plurality of returned candidates or for that matter to the entire election, it is fallacious to urge that it can be only redressed by a writ petition.
- (6) It is a well recognised principle and a matter of public importance that elections should be concluded as early as possible according to time schedule and all controversial matters as well as all disputes arising out of the election should be postponed till after the elections are over so as to avoid an impediment or hindrance in the election proceedings. In other words, there is a provisional finality in matters pertaining to the various stages of election.
- (7) The bar of estoppel cannot be pleaded against a person challenging the election merely

because he takes part in the said election by standing as a candidate or by exercise of his right of franchise therein especially when the impugned election is patently illegal and void ab initio due to the fact such as it being held pursuant to an ultra vires provision in a statute or the Rules. There is no question of approbation and reprobation in case of a person standing or voting at the election, nor is there any bar of laches if he does not challenge such void election at the initial stage and approaches the Court after the said election is over.

(8) Subject to the principle stated immediately hereinabove, if the entire conduct of a petitioner is so eloquent that he can be said to have acquiesced in the act which subsequently he has been complaining as a wrongful act, it may be, one of the factors which the Court exercising jurisdiction under Article 226 of the Constitution in a petition for a writ of Quo Warranto would bear in mind and may, in appropriate circumstances, refuse to exercise its extraordinary jurisdiction of granting a writ in the nature of Quo Warranto.

(9) The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution, is not required to examine the question when the election is challenged on the ground of it being vitiated at its inception due to the fact such as it being held in pursuance of or in accordance with an ultra vires provision of the statute or the Rules, as to whether the election of a returned candidate is materially affected at such election by operation of the ultra vires provision."

Now, if the above principles laid down by the Division Bench of this Court are considered, then it would be quite clear that in the first principle, it has been clearly laid down that though the Court should be slow in exercising jurisdiction under Article 226 and 227 of the Constitution, if the impugned order is ultra vires order or is a nullity as being ex facie without jurisdiction, the question of exhausting alternative remedy could hardly arise. The same view is also expressed by the Division Bench of this Court in the case of Mahesana District Co-operative Sales and Purchase Union Ltd. vs. State of Gujarat, 1988(2) GLR, 1060.

Para-7 of the said judgment reads as under:

"The Division Bench answered this contention in the negative and consequently refused to arrest the election programme which was already set in motion. It must be remembered that the right to be included in the voters' list is conferred by statute and must, therefore, be exercised under the statute and not de hors the said statute since the petitioners have no right in equity or at common law. The right being a statutory right must be exercised within the framework of the statute and if the statute provides for an efficacious remedy for the enforcement of the right, the High Court would be justified in refusing to exercise jurisdiction under Article 226 of the Constitution. The Division Bench after referring to a line of decisions of the Supreme Court and the decision of the Full Bench of this Court in Ahmedabad Cotton Manufacturing Ltd. vs. Union of India, 1977 GLR 704, wherein the principles emerging from the various decisions were summed up, observed in para 26 as under:

"The Division Bench has recognised it on principle as well as in authority that where a right or a liability is created by a statute which gives a special remedy for enforcing it, only the remedy provided by that statute must be availed of unless the impugned order is ultra vires or is a nullity as being ex facie without jurisdiction, and in matters of election dispute, the Court should refuse to exercise the jurisdiction under Article 226 of the Constitution when the statute conferring right to vote or stand at the election prescribes a statutory remedy embracing the disputes pertaining to all aspects of the entire process of election."

In that view of the scheme of the Act, we are of the opinion that the preparation of electoral roll is an integral part of the process of election. If that is so, the question as to whether the roll should be modified at the instance of persons claiming to be voters list is a matter relating to election, and having regard to the fact that it is a right conferred under the Act for which a special remedy has been provided, the Court should not exercise the jurisdiction in the matter since there is a



provisional finality in the matters pertaining to various stages of election and therefore, having regard to the revognised principle in the matter

of public importance that election should be concluded as early as possible according to the time schedule and all controversial matters as wel l as disputes arising out of the election including the right to vote or stand as a candidate should be postponed till after the elections are over so as to avoid impediment or hindrance in the election process, does not arise."

7. It must be also stated here to the credit of the learned Additional Advocate General that he has fairly conceded before this Court that if the order in question is ultra vires or is passed in violation of the statutory provisions of law, this Court has got jurisdiction to consider that order by exercising powers under Article 226 of the Constitution. His only submission is that in the situation of the case and particularly in view of Rule 28 of the said Rules of 1965, and in view of the consistent view taken by the Apex Court in various decisions, which he has cited and to which I will come lateron, this Court should not interfere with the election programme by granting any relief in favour of the present petitioner. But one thing is quite clear that the order which is being challenged before this Court if is found to be an order without jurisdiction or the order in violation of statutory provisions, then this Court has got jurisdiction under Articles 226 and 227 of the Constitution to use its discretionary powers to interfere with the said order. Therefore, it is necessary for me to consider as to whether the order in question could be said to be in violation of the statutory provisions and is also without jurisdiction.

8. Therefore, it is necessary to go to the provisions of various Rules under Gujarat Agricultural Produce Market Rules, 1965. Rule 5 of the Gujarat Agricultural Produce Market Rules, 1965 provides for different lists of voters. Rule 7 makes the provisions for preparation of list of voters for general election for the market committee and then the material Rule is Rule 8. The said Rule 8, which provides for the provision and final publication of list of voters, runs as under:

"8. Provisional and final publication of lists

of voters (1) As soon as a list of voters is prepared under rule 5, it shall be published by the authorised officer by affixing a copy thereof at the office of the market committee and at some conspicuous place in the principal market yard in the market area alongwith a notice stating that any person whose name is not entered in the list of voters and who claims that his name should be entered therein or any person who thinks that his name or the name of some other person has been wrongly entered therein or has not been correctly entered may, within fourteen days from the date of the publication of the notice, apply to the authorised officer for an amendment of the list of voters.

(1-A) After receiving applications if any, under sub-rule (1) a revised draft list of voters shall be published by the authorised officer by affixing a copy thereof on the notice board of Agricultural Produce Market Committee and at some conspicuous place in the principal market yard of the market area, alongwith a notice stating that any person who wishes to raise any objection against any new name entered in this list may apply within seven days from the date of publication of this notice to the authorised officer for an amendment in the revised draft list of voters.)

(2) If any application is received under (sub-rule (1-A), the authorised officer shall decide the same and shall cause to be prepared and published the final list of voters, after making such amendments therein as may be necessary in pursuance of the decision given by him on the application. The final list shall be prepared at least thirty days before the date fixed for the nomination of candidates for the election. "

9. If the above provision of Rule 8 is considered, then it would be quite clear that as soon as voters' list is prepared under Rule 5, the authorised officer who is appointed for conduction of general election of market committee has to publish the said voters' list by affixing a copy thereof at the office of the market committee and at some conspicuous place in the market yard alongwith the notice stating that if any person whose name is not either entered or who claims

that a name is wrongly entered, should file his objection then within 14 days from the date of publication of the notice, the authorised officer has to decide the said objections. Sub-Rule (1) of Rule 8 of the said "Rules of 1965" then further provides that after considering and deciding objections filed under Sub-Rule 1 of Rule 8 as per the said decision, the second list which is known as revised draft list is to be published. But said Rule 8(1A) further makes it quite clear that after publication of the said revised list, a notice is to be issued to raise any objections against new names entered in the list and the said objections must be filed within seven days and thereafter, the authorised officer has to decide the said objections and under Rule 2, he must publish final list 30 days prior to the date fixed for filing nomination papers. Thus, Rule 8 makes it quite clear that when the first preliminary list is published, if any, person has got any objection either on account of appearing of the names of the voters wrongly or on account of non-appearance of the voters, who deserved to be in the voters' list, then he must file said objections within 14 days from the date of publication of the said preliminary list and then the authorised officer has to decide the said objection and only after that decision, he has to publish the revised list. If the provision of sub-Rule (1) of Rule 8 are carefully read, then it would be quite clear that any objection for inclusion or non-inclusion of voters in the preliminary list published under that sub-rule (1) must be taken within 14 days of the said publication. That makes it quite clear that after 14 days of publication of the said list, no objection either for inclusion or non-inclusion could be taken and entertained by the authorised officer.

10. Sub-Rule (1-A) makes it quite clear that when the revised voters' list is published, the only objection that could be raised is as regards persons whose names have been added in the list, after deciding objections under sub-rule (1) of Rule 8. This provision is made obviously with a view to see that a person whose name was not published in the preliminary list and his name comes in the revised list, then there must be opportunity to the person objecting to his being in the voters' list and only with this view, this provision of sub-rule 1(A) is made. If the provision of sub-rule (1-A) is carefully read, alongwith the provision of Rule 1, then it would be quite clear that after publication of the revised draft list, 14 days after publication of the publication of preliminary list under sub-rule 1 of Rule 8, the authorised officer has no jurisdiction to either

add or delete the names of the voters which appear in the revised draft list except those voters whose names were not appearing in the preliminary list published under Rule 1.

11. Now, admittedly, in the instant case, the petitioners in all the three petitions were having their names in the preliminary list published on 24.10.97 as well as in the revised draft list published on 12.11.97. When the names of the petitioners were appearing in the revised draft list published on 12.11.97, it will have to be held and presumed that nobody had taken objection for their names as voters in the list published on 24.10.97 and if there had been any objection, the same must have been rejected by the authorised officer. From the provision of sub-rule (1-A) of Rule 8, it is quite clear that the authorised officer has no jurisdiction once he published the revised draft list after there was either objection or no objection to the appearance of names of voters in the preliminary voters' list published by him. He has only jurisdiction under sub-rule (1-A) of Rule 8 to consider and decide the objections of those voters whose names were not appearing in the first preliminary list, but whose names appearing in the revised draft list published after considering the objections under sub-rule (1) of Rule 8. Therefore, it is quite obvious that the orders of deleting the present petitioners' names from the voters' list are orders passed without jurisdiction. It is also an order in violation of statutory provisions of Rule 8. Therefore, in these circumstances, this Court has got jurisdiction to consider and entertain the present petition.

12. It must be further mentioned here that the order of the authorised officer in deleting the names of the present petitioners is also violative of principles of natural justice. If the provision of Rule 8 as a whole is considered, then it would be quite clear that whenever the authorised officer is considering the question of deleting the name of any voter from the voters' list, he must issue a notice to the said person giving him an opportunity of being heard and then to decide the said objection. In all these petitions, the respondent no. 3 authorised officer has not admittedly given any hearing to any of the petitioners. In one of the affidavits filed by him, he has stated that it was not necessary for him to give hearing. He had personally made inquiries regarding objections and had satisfied himself about correctness of the same. But this approach of the authorised officer is not only against principles of natural justice, but it is in flagrant violation of

the decision of this Court in the case of Desai Dharamsinh Taljabhai and others vs. Babulal Jethalal Patel and others, 1989(2) GLR, 1195. In said case, His Lordship, G.T.Nanavati, J who has been elevated to the Apex Court, has laid down the principles regarding following of principles of natural justice and giving hearing to the persons who are to be affected by the order. Paras 11 and 12 of the said judgment read as under:

"11. In my opinion, what sub-rule (1) of Rule 8 requires is that the Authorised Officer has to publish the preliminary lists of voters and fix a date for inviting objections. After receiving applications for amendment or objections, as they are often described, he has to republish the said lists alongwith the proposed amendments, alterations or deletions and invite objections from the persons likely to be adversely affected by the said proposed amendments, alterations or deletions. Inviting such objections is really in the nature of a hearing to be given to the persons who are likely to be affected thereby. This being the requirement of principles of natural justice, it has been read in sub-rule (1) of Rule 8, and keeping that object in mind, it will have to be held that after the second publication of the preliminary lists of voters what is required to be done by the Authorised Officer is to hear persons likely to be affected by the proposed amendments, alterations or deletions. He cannot receive or entertain fresh applications for new additions, alterations or deletions, or fresh objections in that behalf. The Authorised Officer was therefore, fully justified in this case in not entertaining fresh objections raised by the aforesaid eight co-operative societies for the first time between 10.10.85 and 11.10.85.

12. A conjoining reading of Rule 8(1) and Rule 8(2) also supports this conclusion. Sub-rule (1) requires the Authorised Officer to give a notice while publishing the preliminary voters' lists, for making applications to him for amendment of lists within 14 days from the date of publication of the notice. Thus, the Authorised Officer has to prescribe the last date before which applications for amendment can be made. Applications for amendment of lists of voters are thus required to be made within the

prescribed time and the Authorised Officer would have no authority of law to entertain applications received after that date. Sub-Rule (2) then requires the Authorised Officer to decide those applications and cause to be prepared and published a final list of voters. It does not prescribe any time limit within which that process has to be completed but final list has to be prepared at least thirty days before the date fixed for nomination of candidates for the election. It is therefore, open to the Authorised Officer to decide such applications after further inviting objections to those applications from persons likely to be adversely affected and then decide the same. But in any case, will have no authority to invite or entertain fresh applications for amendment of the list of voters."

It is really shocking to read an affidavit of the "Authorised Officer" supporting his illegal action of not hearing the petitioners inspite of specific decision of this Court which is binding upon him. Apart from this, it is expected of an officer who has to decide judiciously any dispute lying before him to hear a party against whom he intends to take any decision.

13. Therefore, the orders which are challenged in this petition are orders which are passed without jurisdiction and they are passed in violation of statutory provisions and mandate of law and therefore, I hold that the present petitions will have to be entertained by exercising powers under Article 226 of the Constitution of India.

14. I will first deal with the contention raised by Mr. Vakharia learned Senior Counsel for the respondent no. 5 in Special Civil Application NO. 8536 of 1997. As regards his contention that the petitioners' petition should be rejected for non-disclosure of the material facts. It is true that alongwith the petitions, none of the petitioners has given or annexed the election programme declared by the respondent no. 1 for the purpose of general election of the market committee of the respondent no. 3. But I have to consider the relief which the petitioners are seeking and claiming which the petitioners have made in the present petitions and I have to read the petition as a whole. In the petition, it has been clearly mentioned by the petitioners that the respondent no. 1 has

declared the election programme of respondent no. 4 committee. When the petitioners have made a statement in the petition that the respondent no. 1 has declared the programme of respondent no. 4 and in pursuance of the said election programme, preliminary list was published on 24.10.97. It is very difficult to swallow the contention raised by Mr. Vakharia that the petitioners are guilty of misconduct of concealing material facts from the court. The petitioners have also given in their petitions, the date when the votes are to be cast by the voters. The petitioners have also given the date on which nomination papers are to be filed. It is very pertinent to note that it is not the claim of any of the petitioners before me that they want to have quashed and set aside the election programme declared by the respondent no. 1. Their only claim is that their names should appear as voters in the final list of voters to be published under sub-rule (2) of rule 8 of the "Rules of 1965. Therefore, in view of the relief sought for by the present petitioners, non-production of the election programme by the petitioners could not be said to be a purposeful hiding of material facts from the Court so as to reject the claim of the petitioners on the equitable principles of not coming before the Court with clean hands. Therefore, in the circumstances, I am unable to hold that the petitions are liable to be dismissed for non-production of the election programme as one of the annexures to the petition.

15. Mr.B.S.Patel, learned advocate appearing for added respondent no. 6 in Special Civil Application NO. 8536 of 1997 has also raised a contention that two petition nos. 8534 and 8536 of 1997 are filed by co-operative societies and not by members of managing committees of these societies. It is his contention that unless those members of the managing committee are joined as parties in these petitions, the present petitions are not tenable in law. It is true that Special Civil Application Nos. 8534 and 8536 of 1997 are filed by the co-operative societies, but it must be remembered that if the provisions of Rule 5 as well as Rule 7 of the said Rules of 1965 are considered, then it would be quite clear that members of the Managing Committee of the society are to be in the voters' list. When the society files petition, it is obvious that it is filing the same on behalf of its managing committee. It is very pertinent to note that none of those persons whose names are to appear in the voters' list has got individual right to vote as being members of the managing committee of the society. If any of them ceases to be the member of the managing committee, then his right to vote

evaporates. Therefore, when those persons whose rights are not their personal individual rights, but it is the right of the society which is an impersonal entity is to be exercised by them as members of the managing committee. Therefore, in these circumstances, I am unable to accept the contention of Mr. B.S.Patel that the present petitions are bad for non-joinder of those persons.

16. Therefore, after having come to the conclusion that the present petitions are to be entertained under Article 226 of the Constitution, now the question which arises for my consideration is whether granting of the relief sought by petitioners would interfere with the election programme published by respondent no. 1. Before coming to the facts and material before me, I would like to refer to the decision cited by the learned Additional Advocate General Mr. Shelat in support of his contention that this Court should not interfere with the election programme by exercising powers under Articles 226 and 227 of the Constitution. He cited before me the decision in the case N.P. Ponnuswami vs. The Returning Officer, Namakkal Constituency, Namakkal, Salem District, AIR 1952 SC,64 and has put heavy reliance on the observations of the Apex Court. Para-9 of the said judgment runs as under:

"The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and an other after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of part XV of the Constitution and the Representation of the Peoples Act, which as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was



apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it."

At the outset, it must be said that this is a case of election governed by the provisions of Representation of Peoples Act. It was a case of rejection of nomination form. Article 329 of the Constitution of India restricts the powers of the High Court under Article 226 in the election matters governed by Representation of Peoples Act. In addition to this, if the provisions of sections 100 and 101 of Representation of Peoples Act are considered, then it would be quite clear that in that case, the provisions of sections 100 and 101 of the said Act, a special provision is made for election petition and for challenging the election on the grounds mentioned in those two sections and illegal or improper, could be a ground for setting aside the election. In the case before me, the petitioners are only seeking the inclusion of their names in the final voters' I will later on consider the contentions raised on behalf of the respondents as regards efficacious alternative remedy. But on facts of case, I am of the view that this case is not applicable to facts of the case before me.

17. Mr. Shelat, learned Additional General has cited before me four other authorities, namely Laxmi Charan Sen and others vs. A.K.M. Hassan Jzzaman and others, AIR 1985, SC,1233; S.T.Muthusami vs. K.Natarajan and others, AIR 1988, SC,616; Ramchandra Ganpat Shinde and another vs. State of Maharashtra and others, AIR 1994 SC,1673 and Boddula Krishnaiah and another vs.

State Election Commissioner, A.P. 1996(4) Judgement Today (SC)156. In the case of Laxmi Charan Sen (Supra) AIR 1985 SC,1223, the writ petition was filed to challenge the election programme and to stay the election on the ground that claims for inclusion of names and objections relating to inclusion of certain names in the electoral rolls were not disposed of and were pending and consequently election was vitiated. But the Apex Court rejected the said claim by holding that elections are to be held on the basis of electoral rolls in force on the last date of making nominations. It must be also mentioned here that it is also an election under Representation of Peoples Act and the provisions of Article 329 of the Constitution of India are also applicable to such a proceeding. It must be further mentioned that there is a separate statutory provision of Registration of Electoral Rules of 1960. Under the said Rules, when there are any objections for inclusion or non-inclusion of the electoral rolls, then the concerned officer is to have a summary trial and decide the said objections after giving an opportunity of hearing to both the sides. The said Registration of Electoral Rules, 1960 further provide for an appeal against the order passed by the authorised officer in the summary proceedings. In the instant case, there are no such provisions of providing an appeal against the order of the authorised officer and the petitioners are also not seeking any harbouring of the election in question.

18. In the case of S.T. Mutthuswami (Supra) AIR, 1988 SC,616 there was a question of seeking an interference in the writ jurisdiction on the ground of error in allotment of symbols. It was also a case under Representation of Peoples Act. Therefore, it was also governed by Article 329 of the Constitution. In that case, the Apex Court has held that the ground of error in allotment of symbol could be a ground for quashing and setting aside the election and it was not necessary to interfere with the election programme.

19. In the case of R.G.Shinde (Supra), AIR 1994, SC,1673, the Apex Court was more concerned with the orders obtained from the High Court by the parties by playing fraud on the Court. But in that case also, the Apex Court has observed that in deserving cases, the Court can interfere with the decision under Article 226. The order passed by the High Court in that case was quashed and set aside by the Apex Court on the ground that the said order was obtained collusively by playing a fraud on the Court. In the same case, it has been also observed that if the High Court directs for the

modification of electoral roll, the Election Officer cannot question the validity of the said order. It has been observed in para 16 on page no. 1682 as under:

"Therefore, this Court held that there is no constitutional bar in the exercise of the jurisdiction in respect of election to local bodies. It is equally sound exercise of discretion to bear in mind the policy of the legislature to have the dispute decided speedily through the machinery of election petition and decline to exercise its writ jurisdiction in election dispute. Once the election process was set in motion according to law any illegality or irregularity committed while the election process is in progress or the conduct of the election is vitiated by any illegality or irregularity in its process, the proper remedy is to lay the action before the Tribunal constituted under that Act by means of an election petition and have the dispute adjudicated without the election process being interdicted or retarded in its mid way. The High Court or this Court while exercising the constituent plenary power under Article 226 of 32 or under Article 136, as the case may be, would decline to interfere with the election process and relegate the parties to take recourse to the alternative remedy of the election petition provided under the statute. When the order of the Court issued under Article 226 is the foundation for a preparation for electoral roll contrary to or de hors the Act or Rules and bye laws and the election process is founded thereon, it is not during the election process. If the order is vitiated by an error of law, the Tribunal has no power or jurisdiction to go into its legality which is destructive of judicial discipline. Moreover, that cannot be impugned in an election petition nor the Tribunal has the power or jurisdiction to determine the correctness or otherwise of the orders passed by the Court or this Court. The only appropriate forum would, therefore, be the High Court itself or on appeal this Court, to correct it, if need be and no other forum. The appellants had approached the High Court, apprised the facts and sought modification of the order so as it to be in conformity with the Rule 4(1) of the Rules. The High Court should have corrected the order but it failed to exercise that power."

20. In the case of Boddula Krishnaiah, 1996(4) JT,SC,156 (Supra) the Apex Court was considering the election of Panchayat as per amended Part IX of the Constitution of India. Under Article 243(O) of the Constitution of India, there is a specific bar for the High Court to exercise powers under Article 226 of the Constitution in the election of the Panchayat as per amended Constitution of India. Therefore, the observations made in the said case will have to be considered in view of the facts of the said case.

21. Thus, in my opinion, the cases which are cited by the learned Additional Advocate General are to be considered in the background of facts of those cases. No doubt, by now it is very well settled that in the election matter, if there is an efficacious remedy, then the Court would be very slow to interfere with the election programme, particularly if the Court's order is likely to hamper the election programme. In order to consider the question as to whether the petitioners have got an alternative efficacious remedy under Rules or the Governing election in question, the respondents are relying on the provisions of Rule 28 of the Rules of 1965. Before considering this question and referring in detail to the provisions of Rule 28 and other Rules, I want to make it clear that this Court has consistently held that the petitioners who were similarly situated as the petitioners before me have efficacious remedy under Rule 28. This view is taken in both the cases reported in 1988(2) GLR,1060 and 1986 GLH,430. As per the judicial discipline, I am bound by those decisions and I cannot take a contrary view. As those decisions are of the Division Benches, it is also not open for me to direct to place the matter before a full bench. That is possible only in case if this matter happens to go in LPA and the Division Bench dealing with LPA feels to place the matter for consideration before the Full bench. Therefore, I am putting up the material to consider the question of efficacious remedy only for the purpose of consideration of the Division Bench in case Division Bench feels that the matter deserves to be referred to a Full Bench. At the cost of repetition, I also make it clear that it is not open for me to hold that there is no efficacious remedy under Rule 28 in view of the above cited two decisions of this Court.

22. Rule 28 of the said Rules of 1965 runs as under:

"28. Determination of validity of election (1)

If the validity of any election of a member of the Market Committee is brought in question by any person qualified either to be elected or to vote at the election to which such question refers such person may, within seven days after the date of the declaration of the result of the election, apply in writing :

(a) to the Director, if the election has been conducted by a person authorised by the Director, to perform the function of an Election Officer, and

(b) to the State Government if the election has been conducted by the Director as an Election Officer and

(2) On receipt of an application under sub-rule (1), the Director or the State Government, as the case may be, shall after giving an opportunity to the applicant to be heard and after making such inquiry as he or it, as the case may be, deems fit, pass an order confirming or amending the declared result of election or setting the election aside and such order shall be final. If the Director of the State Government as the case may be set aside the election, a date shall be forthwith fixed, and the necessary steps be taken for holding a fresh election for filling up the vacancy of such member."

(Emphasis supplied by me )

Along with the said Rule, it is also necessary to refer to the provisions of Rule 6 of the said Rules. Rule 6 runs as under:

"6. Persons qualified to vote- A person whose name is entered in a list of voters shall be qualified to vote at an election to which the list of voters relates, unless he has ceased to hold the capacity in which his name was entered in such list."

Now, if the provisions of sub-rule (1) of Rule 28 are considered, then it would be quite clear that if validity of the election of the member of the market committee is to be brought into question, any person qualified either to be elected or to vote at the election can file such a petition and Rule 6 says that a person whose name is entered in the list published under sub-rule (2) of Rule 8 is qualified to vote. Therefore, a person whose name does not appear in the voters' list whether could

challenge the election particularly in view of the definition of a person who is entitled or to be elected or vote as given in Rule 6 deserves consideration. It is also to be seen that a person who has been illegally denied right of voting whether can challenge the election and the relief which he wants is only the right to vote and whether on finding that there is an illegal denial to vote, can Election Tribunal grant him relief by quashing and setting aside the election ? All these things are not specifically considered in both the decisions of the Division Bench. But at the cost of repetition, it must be said that as per judicial discipline, I am bound by the ratio laid down by the Division Bench and I hold that there is an efficacious remedy under Rule 28. In all the decisions of the Apex Court, the Apex Court had refused to interfere with the election programme even on account of non-inclusion of the names in the electoral rolls and under the Registration of Electoral Rules, 1960 a specific procedure is laid down. Under the said Rule of 1960 a person whose name has been wrongly not included in the voters list can approach the authority and the authority has to decide his claim in a summary enquiry under Rule 20 after giving an opportunity of hearing to both the sides and then a further appeal is provided under Rules 23 and 27 of the said Rules. In the Rules before me, there are no such provisions. I am also personally of the view that a person whose name does not appear in final list cannot file election petition under Rule 28 of the Rules of 1965. Similarly, on account of illegal deletion of names of voters, it is not open for the Election Tribunal to set aside the election unless the deletion of names is of big number of persons. Then if such person goes before the Election Tribunal, whether he can get any relief as it is very difficult - nearly impossible - for him to prove that his non-inclusion in voters' list had materially affected election. It is also necessary to mention that as the scheme of the Gujarat Agricultural Produce Market Act and the Rules of 1965, name of voter is not to remain permanently on the electoral roll. At the time of every election of Market Committee fresh voters rolls are to be prepared. Therefore, even one gives a decision in his favour in an election petition it will be of no useful purpose. His name could be again deleted at the time of the next election in the same manner. It is also very pertinent to note that under Representation of Peoples Act, election cannot be challenged and quashed and set aside on any ground except grounds given in sections 100 and 101. Now, in the instant Rules, there are no specific provisions as to on what ground, election petition could be filed and what relief could be given except setting

aside election or modifying the result of the election.

23. It is also necessary to mention here other provisions of the said Rules of 1965. Under Rule 10, the respondent no.1 has to declare the election under sub-rule (1) and under sub-rule (2) of Rule 10, he has to fix the election programme. I personally feel that when the respondent no.1 is to exercise powers under this rule 10, he must declare the election programme in such a manner that if any person is aggrieved by the decision of the authorised officer regarding his illegal omission or deletion in the voters' list to have recourse to law. As stated earlier, the Rules nowhere make any provision for providing an appeal or Revision against the order of the authorised authority. Therefore, in these circumstances, when the authorised officer is to decide the question of either inclusion or omission of voters from the voters' list, a heavy duty is cast on him to pass a detailed speaking order after giving an opportunity to the persons of being heard and that has been also observed earlier by this Court in the case of 1989(2) GLR, 1195. But it seems that the authorised officers are deliberately ignoring the said decision of this Court. Therefore, it is expected of the respondent no. 1 to bring to the notice of all the persons who have to work as authorised officer the interpretation of Rule 8 in that judgment of this Court and to direct them to act accordingly. Because this deliberate activity on the part of authorised officers to ignore the decision of this Court is unnecessarily flooding this Court with petitions. I would therefore, direct the respondent no.1 to issue a circular to all the persons who are to work as authorised officer to follow the law laid down by this Court and I also make it very clear that if they flout the law laid down by this Court, that act on their part will amount to contempt of Court. In the present situation of political parties, a heavy duty lies on the Executives to act according to law and not to dance to the tunes of politicians. In the instant case, I fail to understand as to how respondent no. 3 could delete the names of voters after he had published the preliminary list on 24.10.97 as well as revised list on 12.11.97 and his further claim that it was not necessary for him to give any hearing the persons whose names were being deleted. As stated earlier, when the respondent no.1 has to fix the programme of election, he should arrange the said programme in such a manner that there will be sufficient time for the parties who are likely to be affected by the decision of the authorised officer to approach the Court in case if the orders passed against them happens to be illegal, contrary to the provisions of law and without

jurisdiction. He has got sufficient time and opportunity as provided by Rule 10 to arrange election programme in that matter.

24. Now, the next question to be considered by me in this case is whether the relief the petitioner want in this case is to be granted by me and whether granting of the said relief would amount to interference with the election programme. The present petitions are seeking only continuation of their names in the voters' list as per revised voters list published on 12.11.97 and to delete the names of the voters, namely respondent nos. 5 and 6 in Special Civil Application No. 8536 of 1997 whose names were not appearing either in the first list published on 24.10.97 or in the revised list published on 12.11.97. The order which this Court will be passing of substituting the names of the present petitioners in the voters' list as well as deleting the names of respondent nos. 5 and 6 in the voters' list would be in place of the order passed by the respondent no.3 at the time of publishing final voters list on 24.11.97. The question that I am considering and deciding is whether the order passed by the authorised officer on 24.11.97 of deleting the name of the present petitioners in the voters list published on that day on November 27,1997 is legal and valid and therefore, the order which I am going to pass will be in place of that order. The order of this Court will relate back to the order passed by the authorised officer. When I have found that the authorised officer had no jurisdiction to delete the name of the present petitioners from the voters' list, in view of the provisions of sub-rule (1-A) of Rule 8 of the said Rules of 1965, and when I have found that the said deletion is also contrary to the provisions of statutory rules and regulations, as well as principles of natural justice, this order of reinstating of their names will be in place of the order passed by him on 24.11.97. Therefore, I declare and hold that the respondent no. 3 was not justified in deleting the name of the present petitioner from the final voters' list published on 24.11.97 and that the final voters' list should be as per the voters' list, revised voters' list published on 12.11.97. He was not also justified in including names of respondent nos. 5 and 6 in Special Civil Application No. 8536 of 1997, I am unable to hold that by this, there will be any interference in the election programme. Though this order is being passed today, the matter was adjourned earlier on 2.12.97 at the instance of the respondents and they had also made a statement at that time that this order is to be treated to have been passed on 2.12.97. The date of casting votes is 12.1.1998 and there is a



period of more than 30 days between today and the date of casting of votes. Therefore, if the respondent no.3 issues a fresh voters' list as per the order of this Court, it could not be said that there would be any interference in the election programme because out of the said voters list could not adversely affect either filing of nomination papers on 29.12.97 or casting of votes on 12.1.1998.

25. Thus, I hold that the present petition will have to be allowed and the orders passed by the respondent no. 3 in petition nos. 8523 of 1997 and 8534 of 1997 of deleting the names of the present petitioners from the voters' list on 24.11.97 is quashed and set aside and in place of the said order of 24.11.97 passed by him, it is ordered and declared that the names of the present petitioners shall appear in the said voters' list published by him on 24.11.97. In Special Civil Application NO. 8536 of 1997, the orders passed by the respondent no. 3 of deleting the name of the present petitioners from the voters' list and including the name of the respondent nos. 5 and 6 in the voters' list is quashed and set aside and it is ordered and declared that in that order as regards publishing of the final voters' list, the names of respondent nos. 5 and 6 shall be deleted and the names of the petitioners stand added. Rule is made absolute in the above terms, in each petition. The parties are directed to bear their respective costs.

In view of the fact that nomination papers are to be filed on 29.12.1997, and that voting is to take place on 12.1.98, the office is directed to serve the final order passed in these petitions to the respondent no.3 through petitioners.

26. Learned advocates Mr. Tushar Mehta and Mr. B.S.Patel for respondent nos. 5 and 6 in Special Civil Application No. 8536 of 1997 and who appear for respondent no. 4 and added respondent in Special Civil Application Nos. 8523 of 1997 and 8534 of 1997 request to stay the operation of the order passed by this Court as they intend to go in LPA. But the order passed by this Court today is pertaining to election matter and the last date for filing nomination papers is 29.12.97 and if I stay the operation of this order which has been passed by me on merits after considering contentions of both the sides, it will indirectly negative the petitioners' claim. I therefore, hold that in the nature of the proceedings, the order in question could not be stayed. I therefore, reject their claim.

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